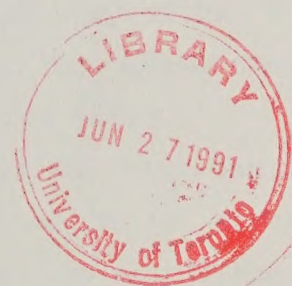


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WATER EXPORTS

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WATER EXPORTS

ISSUE DEFINITION

Canada is the single largest proprietor of fresh water resources in the world. This vast abundance of water has prompted some to advocate its export to water-poor regions, primarily the southwestern region of the United States. Particularly during the last two decades, the possibility of exporting water from Canada has arisen repeatedly.

During the 1960s, a number of water diversion proposals were developed by engineers and planners. Because of the extreme costs involved, many of these proposals were not considered viable by either the U.S. or Canadian government. One such proposal, however, the GRAND canal scheme, has continued to receive attention over the past few years.

In November 1987, the Honourable Tom McMillan, Minister of the Environment, announced a federal water policy in which he stated unequivocally that the federal government was opposed to large-scale exports of our water and would take all possible measures within the limits of its constitutional authority to prohibit such exports by inter-basin transfers. The Minister later tabled Bill C-156 to give legal force to that commitment but the bill died on the Order Paper with the dissolution of Parliament on 1 October 1988.

Another current issue is whether water is included under the free trade agreement with the United States.

BACKGROUND AND ANALYSIS

A. Constitutional Framework

Under the Canadian Constitution, jurisdiction over water is divided between the federal and provincial governments, and to some extent overlaps. The Constitution does not specifically mention water; however, it does deal with some water uses, such as navigation, fisheries and, more recently, electrical energy generation. Most questions of jurisdiction must be inferred from the Constitution's treatment of other issues such as property rights, foreign relations, and international trade. Since the use of water resources has both national and provincial implications, both levels may lay claim to legislative competence within their respective spheres.

The provinces generally have authority over the natural resources, including water, within their boundaries. Their jurisdiction over water derives from specific clauses in the Constitution which assign them jurisdiction over such matters as: property and civil rights, the management and sale of public lands (including water), and matters of a local or private nature. A 1982 amendment to the Constitution Act, 1867 specifies that the provinces also have jurisdiction over electricity generating works.

The provinces' considerable jurisdiction over water within their boundaries is, however, limited by specific powers assigned exclusively to the federal government. Examples are authority over fisheries, navigation, relations with foreign governments, federal lands, Indians, works for "the general advantage of Canada" and "peace, order and good government."

The effect of the constitutional division of powers is that a water export scheme would succeed only with the support and cooperation of both levels of government. Except with respect to federally-owned or administered lands, the provinces possess a proprietary interest in the water resources within their borders. Accordingly, they have both legislative and proprietary rights to deal with water, although these are subject to federal authority in certain specified areas. Within the limits imposed

by the Constitution, the provinces are free to manage their water resources within their boundaries, at least in the absence of an emergency or national interest to justify federal intervention on the basis of the residual power granted by the "peace, order and good government" clause, or the federal declaratory power. Nevertheless, where water is exported from a province, the federal government necessarily becomes involved.

B. Water Export Possibilities

Although most media attention has focused on proposals for massive river diversions into the United States, water export possibilities take a number of forms, some of which may be more feasible than others. Because their policy implications differ, it is important to distinguish them from each other.

Currently, examples of Canada's trade in water resources with the U.S. occur when water supplies are piped from Canadian border communities to neighbouring U.S. communities. For example, water is piped from Coutts, Alberta, to serve local needs in Sweetgrass, Montana. In another arrangement, water is supplied from Gretna, Manitoba, to the community of Necho, North Dakota. There are also similar exchanges of water between St. Stephen, New Brunswick and Calais, Maine.

These transborder water systems are minor and do not involve inter-basin transfers. They are considered to be convenient ways of rationalizing local supplies between neighbouring communities and do not involve questions of national concern. They are not considered to be water exports in the true sense of the term.

In the past an interest has also been shown in the possibilities of using ocean tankers to ship water from Canada to foreign markets. Like small transborder water supplies, tanker exports on the scale contemplated thus far involve almost insignificant volumes of water and would presumably involve no serious environmental disruptions. Moreover, they are unlikely to lead to so much dependence on Canadian supplies as to imply irrevocable commitments of our natural resources.

The abundance of water in Canada and the increasing pressure on supplies in some regions of the United States have repeatedly attracted

the attention of engineers and planners to the possibilities of diverting Canadian rivers southward. Interest became especially keen after 1963 when the United States Supreme Court restricted California's use of the Colorado River. A number of water diversion proposals were thus developed, many of which were extremely costly.

One well publicized export scheme was the North American Water and Power Alliance (NAWAPA) proposal which was conceived by a private engineering firm in California. It involved diverting flows from the Mackenzie and Yukon River basins southward through the Rocky Mountain Trench into the United States to provide irrigation water to the southwestern states, generate hydroelectricity and create navigation routes. The cost of the project would have been approximately \$355 billion in 1984 Canadian dollars. The NAWAPA project, like numerous other water diversion projects developed during the 1960s, was never considered by either the U.S. or Canadian government as a viable proposal and has largely been forgotten.

A project which has continued to receive attention is the GRAND canal scheme which was first developed in 1959. In 1984, its originator, Thomas Kierans, presented to the Inquiry on Federal Water Policy a new version of the project which would involve a dyke across James Bay to entrap the rivers flowing into it from Ontario and Quebec and reverse 17% of their flow southward. This flow would be withdrawn from the freshwater reservoir, channelled through river valleys, reservoirs and pumping stations some 640 kilometres, raised 300 metres over the Canadian Shield and discharged into the Ottawa River. From there water would be diverted to Lake Huron through Lake Nipissing and the French River, another 180 kilometres. Water from the Great Lakes would then be diverted to the United States southwest and the drier regions of Western Canada. In 1985, the GRAND Canal Company Ltd. estimated that its construction costs alone would be in the order of \$100 billion.

The above proposal for water diversion has been advocated by Simon Reisman, Canada's chief negotiator in the Canada-U.S. free trade talks, and Premier Robert Bourassa of Quebec. In a paper delivered at an Ontario Economic Council conference shortly before his appointment as chief

negotiator, Mr. Reisman suggested that Canada could reap enormous economic benefits from this proposed project. It would also provide Canada with substantial economic leverage since this country would own the water and would be in a position to control its use. Premier Bourassa has also promoted the scheme in his book entitled Power for the North.

Proponents of the GRAND Canal scheme suggest that it would serve a variety of useful purposes. They argue that such a scheme would significantly increase the flow into the Great Lakes, thereby stabilizing their levels in the face of growing demands for water consumption and possible climatic changes that might reduce natural inflows. They suggest as well that the additional supplies would improve the water quality in the Great Lakes and would provide for irrigation on the Canadian prairies and in the dry United States southwest where groundwater is being depleted.

Critics of the scheme, on the other hand, argue that the above benefits are speculative, and that even the economic implications of the scheme are unfavourable. They take the position that there is not an identifiable market for water diverted to the United States that would recoup the massive capital and operating costs. They maintain that the environmental and social disruption that would result from this scheme would be widespread and uncertain. They are also concerned that the proposal would alter a vast area of Northern Ontario, and that the effects of interrupting river flows would be felt on distant fisheries and ocean regimes on the east coast. They contend, as well, that the scheme would present major problems in controlling water levels and regulating flows in the Great Lakes system.

The Inquiry on Federal Water Policy (Pearse Commission), discussed in the following section, in its 1985 report noted that large-scale diversions of Canadian waters into the United States raise a number of policy issues not shared by the more modest forms of water export referred to earlier. Large-scale diversions involve water transfers from one watershed to another, and in many cases from one oceanic basin to another. The Inquiry pointed out that inter-basin transfers, like other big water-development projects, involve significant changes to the natural environment by interrupting river flows, flooding, transferring life forms

and even changing atmospheric and ocean conditions. The ultimate consequences of these changes are uncertain. The Inquiry also noted that large scale diversions impinge on land and other uses of natural resources and threaten to dislocate established communities dependent on them. The Inquiry observed that the capital investment required would be enormous and difficult to predict with precision, given the long construction periods. Moreover, capital costs could be recouped, if at all, only over a long operational period, which would present additional uncertainties about costs, benefits and the future direction of technological change. These complications would be aggravated by the international dimensions of these schemes, which, because of their scale, interjurisdictional dimension and multiple effects, call for a high degree of governmental involvement. The Inquiry noted as well that since these schemes would involve overland water diversions across the border, they would invoke our established arrangements with the United States under treaties and international law for managing international waterways.

C. Inquiry on Federal Water Policy

In January 1984, in response to a growing environmental consciousness and concern about the management of Canada's freshwater resources, an advisory committee (the Pearse Commission) was established by the federal Minister of the Environment to assess the adequacy of federal water policy and the capacity of Canadian institutions to respond to changing circumstances. One aspect of the issue which received substantial attention from the advisory committee was the matter of water exports.

The Inquiry, which submitted its findings in September 1985, advocated a cautious approach to developing a federal policy for water exports generally, but concluded that it would be imprudent for the federal government to reject all such exports out of hand. The Inquiry was of the view that a federal policy for procedures on water exports should clearly set out the conditions that must be met for any proposal to be acceptable. The Inquiry noted that since the provinces license water uses within their boundaries, these federal criteria should emphasize considerations of federal and national concern including among other things:

- impacts on fisheries, navigation, federal waters and international and interjurisdictional waters;
- international economic, political and strategic considerations;
- implications for the ability of available water supplies to meet long-term Canadian requirements, taking into account uncertainties about these requirements and the cumulative effects of exports on a regional and national scale;
- regional environmental and economic effects;
- implications for the interests of native and other social groups, and the adequacy of compensation for adverse effects;
- the general economic advantages to Canada.

It was observed that there would be a need for the federal and provincial governments to collaborate in this matter since, in almost all conceivable cases, proposals would require provincial approval.

The Inquiry noted that in order to effect these arrangements, the federal government would need legislative authority to review water export proposals. They accordingly recommended that the federal government should enact legislation requiring anyone who proposed to export water to obtain a licence and identifying the matters, including those noted above, that would be taken into account in considering a licence application.

The Inquiry observed that the above licensing requirement would be sufficient to enable the Minister to review small scale export proposals, such as those involved in tanker operations and small transborder water supplies. As long as a proposal did not have any significant implications for any of the above specified considerations, and had already been approved by the relevant provincial government, the licence could be granted.

The Inquiry concluded that there was no reason for the federal government to oppose tanker exports in general, and that, in the absence of any significant adverse effects of particular proposals, it

should regulate, not prohibit them. However, the Inquiry clearly distinguished small scale water export proposals, such as tanker operations and small transborder water supplies, from interbasin transfers to the United States. With respect to the latter, the Inquiry recommended that the federal Cabinet should, first of all, determine whether the federal government is prepared to entertain such proposals and if so, the criteria that must be met for their approval.

Finally, if the government was prepared to consider diversions to the United States, the legislation providing for federal approval should include special provisions for assessing large-scale projects. The Inquiry recommended that for the purposes of assessing water export proposals having significant environmental, social or economic implications, the Minister of the Environment should be empowered to appoint a special review panel which would, among other things, receive information from relevant parties, hold public hearings where necessary, and publicly report its findings, with recommendations as to whether a licence should be granted and, if so, what terms and conditions should be attached to it.

D. Water Export Policy

The Minister of the Environment indicated the federal government's position concerning water exports in its water policy announced in November 1987.

The Minister noted that while Canadians have an abundance of water, most of it is not where it is needed, that is, in the populated areas of the country. In those populated areas where it is plentiful, water is fast becoming polluted and unusable. The overall problem in the country is compounded by drought in certain regions. This is why the Minister indicated that the Government of Canada emphatically opposes large-scale exports of our water. He specified another reason as well - the inter-basin diversions necessary for such exports would inflict enormous harm on both the environment and society, especially in the North, where the ecology is delicate and where the effects on native cultures would be devastating.

The federal government indicated in its water policy that insofar as water exports are concerned, it would take all possible measures within the limits of its constitutional authority to prohibit the export of Canadian water by interbasin diversions, and strengthen federal legislation to the extent necessary to implement this policy fully.

PARLIAMENTARY ACTION

A. Bill C-257

Mr. Charles Caccia introduced in the House of Commons on 17 December 1985 Private Member's Bill, C-257, the Water Export and Diversion Act. The bill did not go beyond first reading. Had it been enacted into law, the bill would have provided a statutory framework for the regulation of water export and diversion.

B. Bill C-130

On 24 May 1988, Bill C-130, An Act to Implement the Free Trade Agreement Between Canada and the United States of America, was introduced in the House of Commons by the Minister for International Trade, the Honourable John Crosbie.

The bill was amended at the committee stage in the House of Commons to include a provision to provide specifically that the free trade agreement would not apply to water. The bill stated that "water," for purposes of the above provision, is "natural surface and ground water in liquid, gaseous or solid state, but does not include water packaged as a beverage or in tanks." Another amendment at the committee stage deleted a provision which would have given the bill and the free trade agreement precedence over any conflicting federal statutes or regulations.

Mr. Crosbie indicated that the free trade agreement would not oblige Canada to export water to the United States, nor could it be used to compel Canada to do so. He stated that this was already implicit in the agreement, but that the amendment would remove any doubt on the matter.

The bill died on the Order Paper with the dissolution of Parliament on 1 October 1988.

Critics argue that since the free trade agreement incorporates the tariff schedule of the General Agreement on Tariffs and Trade (GATT), and since tariff item 22.01 of the GATT lists "waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter not flavoured; ice and snow," therefore natural water of all kinds, except for sea water, is included in the free-trade deal, or at least, is not specifically excluded. They claim that the amendment to the implementing legislation, without modification of the agreement itself, is insufficient.

Mr. Mel Clark, a retired federal trade negotiator who led the battle to ensure that the free trade agreement specifically excludes major water diversion schemes, says that Mr. Crosbie is technically correct when he argues that there is nothing in the free trade agreement which obliges Canada to export water to the United States. Mr. Clark goes on to state, however:

Nothing in the trade agreement obliges us to sell anything. It is a misleading answer. The question is whether the FTA decreases our ability to manage our resources for our own purposes. The answer is yes unless it is specifically excluded.

He contends that no unilateral statement by either government will supersede the bilateral agreement.

Opposition spokesmen have similarly argued that the free trade agreement itself must be amended specifically to exclude water.

Warnings about the possible implications of free trade for water exports were also sounded in a book entitled Water and Free Trade, edited by Wendy Holm (James Lorimer and Co., publishers), which was released on 1 November 1988.

C. Bill C-156

On 25 August 1988, the Minister of the Environment, the Honourable Tom McMillan, tabled in the House of Commons Bill C-156, the Canada Water Preservation Act. The Minister indicated that he was tabling the bill to give legal force to the commitment of the federal government, expressed in its federal water policy introduced in November 1987, that it would oppose large-scale water exports. The bill later died on the Order Paper with the dissolution of Parliament on 1 October 1988.

Had it been enacted into law, the bill would have prohibited outright large-scale freshwater exports such as those involving inter-basin transfers between river systems and strictly regulated small-scale water exports such as those involving shipments by tanker or pipeline. Very small-scale exports, such as water used in manufactured goods and bottled or packaged water, would not have been affected by the legislation.

The bill, which would have been binding not only on the private sector but also on all levels of government, would have provided for the creation of federal-provincial agreements for licensing small-scale exports. The Governor in Council would have been granted broad regulation-making powers respecting licences, such as: the procedure to be followed in applying for and issuing licences; their duration, transfer, renewal, revocation and suspension; fees; the criteria to be used in deciding whether to issue or renew licences; and public hearings and the disclosure of information in connection with the issuance, renewal, revocation or suspension of licences.

The Governor in Council would also have been granted the power to exempt from the licensing requirement by order, "the exportation or diversion of water in the circumstances set out in the order." The above provision would have allowed exemptions from regulation for very small exports, but would in no way have sidestepped the prohibition on large-scale exports.

No export licence would have been granted under the bill without a thorough environmental assessment.

The bill also contained detailed enforcement provisions and would have provided for penalties of up to \$1 million and three months in jail for violators.

Thus, the bill would have killed proposals such as the \$100 billion James Bay Diversion, the so-called GRAND canal scheme discussed earlier.

Critics take the position that the proposed legislation would have failed to counter the threat of the free trade agreement. They are of the view that only an explicit exemption in the agreement itself would fully protect Canada's water resources from American interests. They contend that, as the agreement now stands, it would be given precedence over domestic legislation.

D. Bill C-309

Bill C-309, the Canada Water Protection Act, a Private Member's bill, was introduced in the House of Commons on 19 July 1988 by Mr. Nelson Riis. Among its provisions was one which would have expressly prohibited the export of water from Canada by inter-basin transfers. The bill died on the Order Paper with the dissolution of Parliament on 1 October 1988.

E. Bill C-2

In December 1988, Bill C-2, the Canada-United States Free Trade Agreement Implementation Act, was passed by the House of Commons and the Senate and received Royal Assent.

Like its predecessor, Bill C-130 in the second session of the 33rd Parliament, the Act includes a provision stating specifically that the Free Trade Agreement does not apply to water. In the Act, "water," for purposes of the above provision, is "natural surface and ground water in liquid, gaseous or solid state, but does not include water packaged as a beverage or in tanks." (Please see p. 9-10 for a fuller discussion of this provision.)

F. Bill C-221

Bill C-221, the Canada Water Protection Act, a Private Member's bill, was introduced in the House of Commons on 11 April 1989 by Mr. Nelson Riis. The bill is identical to his earlier bill, C-309, which was introduced in the second session of the 33rd Parliament.

Bill C-221 received second reading in the House of Commons on 11 June 1990.

CHRONOLOGY

- January 1984 - The Minister of the Environment appointed an advisory committee to inquire into and make recommendations concerning a wide range of problems relating to the federal government's water policy.
- September 1985 - The Inquiry on Federal Water Policy submitted its report to the federal government.
- 17 December 1985 - Bill C-257, the Water Export and Diversion Act, a Private Member's Bill, was introduced in the House of Commons by Mr. Charles Caccia, M.P. The bill did not go beyond first reading.
- November 1987 - The Minister of the Environment announced the federal government's water policy, including the federal government's position on water exports.
- 24 May 1988 - Bill C-130, an Act to Implement the Free Trade Agreement Between Canada and the United States of America, was introduced in the House of Commons by the Minister for International Trade.
- 29 June 1988 - Bill 175, the Water Transfer Control Act, 1988, was introduced in the Ontario Legislature by the Minister of Natural Resources. The bill would prohibit the transfer of water out of any of the province's five major drainage basins without the approval of the Minister of Natural Resources. The Minister would be authorized to attach conditions or require payment to the government before approving a transfer. However, consent would not be granted if the Minister believed the transfer might be detrimental to ensuring a secure water supply for Ontario or Canada or any part thereof.

- 19 July 1988 - Bill C-309, the Canada Water Protection Act, a Private Member's bill, was introduced in the House of Commons by Mr. Nelson Riis, M.P.
- 25 August 1988 - Bill C-156, the Canada Water Preservation Act, was introduced in the House of Commons by the Minister of the Environment.
- 15 September 1988 - Bill C-130 received second reading and was later amended at the committee stage so as specifically to exclude water from the free trade agreement.
- 1 October 1988 - Bills C-130, C-156, and C-309 died on the Order Paper with the dissolution of the 33rd Parliament.
- 10 November 1988 - The Minister of Natural Resources in the Ontario Legislature introduced an amendment to Bill 175, the Water Transfer Control Act, 1988, to provide that the Minister shall refuse to give approval to a transfer of water out of a provincial drainage basin to a place outside Canada.
- December 1988 - Bill C-2, the Canada-United States Free Trade Agreement Implementation Act, was passed by the House of Commons and the Senate and received Royal Assent.
- 1 January 1989 - The Canada-United States Free Trade Agreement came into effect.
- 1 March 1989 - Bill 175, the Water Transfer Control Act, 1988, was read for the third time in the Ontario Legislature and received Royal Assent the following day. The bill is to come into force on a day to be named by proclamation of the Lieutenant Governor.
- 11 April 1989 - Bill C-221, the Canada Water Protection Act, a Private Member's bill, was introduced in the House of Commons by Mr. Nelson Riis, M.P. The bill is identical to his earlier bill, C-309 (2nd session, 33rd Parliament).
- 11 June 1990 - Bill C-221 received second reading in the House of Commons.

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